

Decision 01-10-071 October 25, 2001

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

The Utility Consumers' Action Network (UCAN),

Complainants,

vs.

Pacific Bell (U-1001-C),

Defendant.

Case 99-06-053  
(Filed June 29, 1999)

**OPINION APPROVING SETTLEMENT**

**1. Summary**

We conclude that the Settlement Proposal (Settlement) between Utility Consumers' Action Network (UCAN) and Pacific Bell (Pacific) is in the public interest and we approve it, thereby requiring Pacific to provide broader customer notice of its averaging error and to implement additional consumer safeguards, under the terms of the Settlement.

**2. Procedural and Factual Background**

UCAN's complaint, filed on June 29, 1999, alleges that Pacific deceptively marketed its "Saver 60" intraLATA toll calling plan to residential customers during the late spring of 1999 using direct mail and customer service representatives. The marketing effort targeted customers based upon a calling profile. This calling profile was compiled by averaging a customer's toll charges for three consecutive months (December 1998 through February 1999) and

comparing the average to the monthly cost of the plan. The answer, filed August 19, 1999, denies Pacific's activities were deceptive but admits that Pacific used these marketing methods and that the marketing effort targeted residential customers based on the three-month average. The answer also admits that for some customers, while comparison of the three-month average against the monthly cost of the plan indicated savings would have been realized under the plan, comparison of the same charges for the same period – but on a month-by-month basis – yields the opposite result.

Discussion at the September 21, 1999 prehearing conference confirmed that very few material facts were in dispute at that time. The Assigned Commissioner's Scoping Memo, issued September 24, directed the parties to meet and confer to explore the possibility of submitting a joint stipulation of fact. The Scoping Memo also scheduled limited evidentiary hearing, on January 10, 2000, on the issue of whether customers were deceived by Pacific's marketing campaign.

On November 1, 1999, the parties filed a comprehensive document entitled 'Stipulated Facts' and in December, distributed prepared testimony. Thereafter, at the parties' request, the Commission reset evidentiary hearing several times to accommodate unforeseen scheduling conflicts, including a witness' illness. In Decision (D.) 00-05-039, the Commission extended the 12-month deadline for resolution of this adjudicatory proceeding, as Pub. Util. Code §1701.2(d) requires.<sup>1</sup>

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<sup>1</sup> Unless otherwise indicated, all subsequent citations to sections refer to the Public Utilities Code, and all subsequent citations to rules refer to the Rules of Practice and

*Footnote continued on next page*

Subsequently, the parties negotiated settlement of this complaint and by motion filed June 22, 2000 now request adoption of the Settlement which is Attachment 1 to the motion. The Settlement is appended to this decision as well.

### **3. Stipulated Facts**

The parties' Stipulated Facts consist of 74 separately numbered stipulations and approximately 23 separately numbered attachments. The stipulations reveal the following factual agreement:

- Pacific offers the two intraLATA local toll calling plans at issue in this proceeding pursuant to its tariff Cal PUC A6.4.4, "The Pacific Bell Saver 60 Plan" (Saver 60) and the "Pacific Bell Saver Plus" (Saver Plus).<sup>2</sup>
- Between April 22 and May 8, 1999, Pacific used a direct mail letter campaign to market Saver 60 to 202,462 targeted residential customers and Saver Plus to 223,991 targeted residential customers. The letters represented that "[b]ased on your calling history from December 1998 through February 1999, you would have saved money with our [local toll] plan" and urged interested customers to return a postage-paid envelope or contact Pacific via a toll-free number.<sup>3</sup> The SBC Operations, Inc., Corporate Call Center, associated with Pacific's parent company SBC Inc. (SBC), answered calls to this toll-free number.
- Between May 14 and May 19, 1999, Pacific followed up with a direct mail postcard to 2,600,000 residential customers, including those targeted by the letter campaign. The postcard did not include representations that the local toll plans would save customers money

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Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations.

<sup>2</sup> Saver 60 includes 60 minutes of toll calling for a fixed monthly rate, with excess time charged separately, as further detailed in the tariff. Saver Plus is structured in the same manner, but includes 180 minutes of toll calling for a fixed monthly rate.

<sup>3</sup> A footnote following this language stated: "Savings may vary depending upon your calling patterns."

but urged interested customers to contact Pacific via a toll-free number (different from the number listed in the letters). Pacific Bell Call Centers answered calls to this toll-free number.

- Between May 6 and June 15, 1999, the SBC Operations, Inc. Corporate Call Center marketed Pacific's toll call plans by telephone solicitation of a target market numbering 720,000 residential customers.
- Training materials and sales scripts used by SBC and Pacific customer service representatives who answered in-bound calls about the toll call plans or made out-bound telephone solicitations did not contain the three-month averaging sales strategy.
- On May 26, 1999 (about a month before filing the complaint) UCAN contacted Pacific by letter to express concern that one of its members, Mr. James MacFarlane, had calculated he would have been charged \$14.10 under the Saver 60 plan for toll calls he made from December 1998 through February 1999, or 5.46% more than the \$13.33 he actually incurred. MacFarlane, a residential customer, had received the Saver 60 direct mail letter.
- On June 24, 1999 (five days before the complaint was filed) Pacific contacted UCAN by letter, acknowledged the error, stated it had discontinued the mailing, and described the research and refund activities it planned to undertake.
- Pacific's records show that 1,330 customers who purchased Saver 60 after receiving the Saver 60 direct mail letter, both (1) did not save money under the plan after purchasing it; and (2) fit the MacFarlane profile. That is, for each of these customers, the three-month average of the customer's December 1998 through February 1999 toll call charges erroneously suggested plan savings because, on a month-to-month basis, the plan cost more.
- Pacific's records show that 222 customers who purchased Saver Plus after receiving the Saver Plus direct mail letter, both (1) did not save money under the plan after purchasing it; and (2) fit the MacFarlane profile. That is, for each of these customers, the three-month average of the customer's December 1998 through February 1999 toll call charges erroneously suggested plan savings because, on a month-to-month basis, the plan cost more.

- On September 23, 1999, Pacific wrote to the identified 1,330 Saver 60 customers, disclosed the calculation error, and stated the customers' accounts would be adjusted. The account adjustments total \$9,329.69.
- As of October 29, 1999, the date the Stipulated Facts were executed by the parties, Pacific was in the process of writing to the identified 222 Saver Plus customers to disclose the calculation error and explain the customers' accounts would be adjusted. These additional account adjustments total \$3,105.40.

The Stipulated Facts do not identify the total number of customers who received inaccurate calling profile information by direct mail. The Stipulated Facts identify only the 1,552 customers (1,330 plus 222) who received inaccurate calling profile information, purchased a toll call plan, and then failed to save money. The Stipulated Facts also quantify the refunds already made to these 1,552 customers.

However, two additional groups of customers received inaccurate calling profile information by direct mail: those who did not purchase a plan; and those who purchased one and thereafter, did save money. At the time the parties executed the Stipulated Facts, Pacific had not quantified these groups but was working to do so. The Settlement provides this additional quantification.

#### **4. The Settlement**

The Settlement resolves all issues pending between UCAN and Pacific in this proceeding. It focuses on remedies, acknowledging the remedial action Pacific has already undertaken (i.e., refunds to 1,552 customers and a ban on the averaging of customers' variable usage data) and obligating Pacific (1) to provide broader notice of its averaging error and (2) to implement specified consumer safeguards in connection with telephone marketing.

The Settlement's "Summary of Material Facts" provides the factual information unavailable in the Stipulated Facts. Specifically: "The contents and

claim of the [toll call plan] mailing did not apply accurately to 68,793 residential customers.” This number comprises the total number of customers who were advised by direct mail, erroneously, about their savings prospects under a toll call plan – that is, all of these customers fit the MacFarlane profile. The “Summary of Material Facts” also establishes that 65,133 of these customers did not purchase a toll call plan; 1,108 customers purchased a plan and then did save money.

Under the terms of the Settlement, Pacific must notify both of these additional categories of residential customers about the three-month averaging error in the direct mail solicitation. Upon request, Pacific will offer those who purchased a toll call plan a refund of the monthly service fee, including taxes and surcharges, for no less than three months, and will rescind the plan.

In addition, the Settlement requires Pacific to establish a two-way “feed back mechanism” when Pacific telemarkets services like these toll call plans, whether using its own employees, SBC’s telemarketers, or independent contractors. The Settlement states: “Pacific must ensure that those placing or receiving calls on behalf of Pacific have an established method to identify and communicate customer feedback and/or complaints encountered when calling on behalf of Pacific Bell.” Attachment A to the Settlement provides the details of this feedback mechanism, which requires the parallel referral of problems to the marketing manager for a given product/service (i.e., the Specific Segment Marketing Manager) and to a contact in the Teleservices staff, with coordinated reporting of follow up and resolution.

With respect to future sales of toll calling plans, whether as a result of in-bound or out-bound contacts, the Settlement also obligates Pacific to identify which monthly telephone bill is being used as a basis for calculating whether the

plan could yield savings for that customer. A new sales script, Attachment B to the Settlement, supplies important details. Though the script permits examination of more than one month, each month must be assessed separately i.e., Pacific cannot average toll call usage for more than one month.

## **5. Standard for Review of Settlements**

Settlements must comply with Rule 51.1(e), which provides:

The Commission will not approve ... settlements, whether contested or uncontested, unless the ... settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

When, such as here, a settlement is presented as an “all party” settlement, we review it for conformance with the four broad guidelines we adopted in *Re San Diego Gas and Electric Company*, D.92-12-019, (1992) 46 CPUC 2d 538. The parties’ motion argues that the Settlement comports with each of those guidelines. The guidelines provide:

- a. a proposed all-party settlement commands the unanimous sponsorship of all active parties to the instant proceeding;
- b. the sponsoring parties are fairly reflective of the affected interests;
- c. no term of the settlement contravenes statutory provisions or prior Commission decisions; and
- d. the settlement conveys to the Commission sufficient information to permit us to discharge our future regulatory obligations with respect to the parties and their interests.

In past proceedings we also have acknowledged the similarity between our review of an all-party settlement for reasonableness and fairness and a court’s review of whether a proposed class action settlement is fundamentally fair, adequate and reasonable. (See *Re Pacific Gas and Electric Company*, D.88-12-083, (1988) 30 CPUC 2d 189 [*Diablo Canyon*]; see also *Re Edison*, D.93-03-021 (1993) 48 CPUC 2d 352.) The Settlement includes, as Section D,

identification of the ways in which the parties' agreement meets the public interest criteria articulated in *Diablo Canyon* and followed in subsequent Commission decisions.

## **6. Discussion**

As a threshold matter, we find that the Settlement meets each of the all-party guidelines articulated above. Regarding the first guideline, we note UCAN and Pacific are the only parties, no other person or entity has sought to intervene for any purpose, and the executed settlement is unopposed.

With respect to the second, we are persuaded that utility and ratepayer interests have been asserted by and are adequately represented by these parties. Not only do UCAN's Articles of Incorporation authorize the representation of residential customer interests in our proceedings generally, but UCAN filed this complaint after one of its members received Pacific's direct mail letter. UCAN detected the fact that, for some customers, an average of three months' of toll calling charges was not an accurate indicator of whether Saver 60 or Saver Plus would save money. The record reflects that UCAN pursued its claims vigorously.

As for the third guideline, the parties represent that they "expended considerable effort ensuring that the Settlement Agreement comports with statute and precedents" and we are aware of no conflicts. We discuss, below, our conclusion that the Settlement comports with *Diablo Canyon*. The parties meet the fourth guideline because the detail in the factual stipulations and the detail in the Settlement and its two attachments provide clarity both as to the problem and the parties' solution. Should we need to enforce the Settlement, for example, we have the information necessary to do so.



*Diablo Canyon* held that a number of factors may contribute to a balanced public interest evaluation. Among them are the extent to which discovery has been completed so that opposing parties can gauge the strength and weakness of their relative positions; the stage of the proceedings; the risk, expense, complexity and likely duration of further litigation; whether the settlement negotiations were at arm's length and without collusion; and whether the major issues are addressed in the settlement.

Here, as the parties represent, settlement has occurred late enough so that the parties have been able to assess the strengths and weaknesses of one another's positions but early enough to avoid the time and expense, for themselves as well as the Commission, associated with evidentiary hearing. Before they entered into settlement negotiations, the parties completed extensive discovery, reached a comprehensive list of stipulated facts, and drafted and distributed prepared testimony. Thus, as the date for evidentiary hearing approached, the issues unresolved between the parties centered on what additional remedies, if any, were warranted. The Settlement resolves these remaining issues and we consider, now, the reasonableness of the parties' negotiated solutions.

The parties have agreed that Pacific will provide notice of its averaging error to the remaining two groups of customers who were advised inaccurately, based on their December 1998 through February 1999 toll charges, that the toll call plans likely would provide them with monetary benefits. Providing customers with notice that the prior assessment was wrong will empower them to make informed choices about whether or not to purchase a toll calling plan in future, and if they have purchased one already, to decide whether it does meet their needs. Accurate information is a powerful consumer safeguard. The

opportunity to “choose” among competing service options has little value unless the information provided by a utility and relied upon by customers is trustworthy.

Likewise, the other remedies provide fundamental consumer protection. A telemarketing feedback loop, such as the one detailed in Attachment A of the Settlement, is critical to enable timely referral and resolution of any consumer complaints which arise in connection with marketing activities like this one. We are surprised that Pacific did not already have such a system in place.

For the future, we agree that Pacific should identify which monthly telephone bill is used as the basis for any customer savings calculations and should not use “averages.” This aspect of the Settlement, including Attachment B to the Settlement, will avoid the repetition of complaints like this one. As the facts developed in this proceeding demonstrate, an “average” of several months’ usage data may not reflect accurately whether an optional, monthly service plan has savings potential.

The Settlement does not propose a penalty for Pacific’s error. Under other factual circumstances we might consider one. The facts of this case show that Pacific acknowledged its error, took steps to avoid perpetrating the error (including a self-imposed ban on averaging customers’ variable usage data), and promptly processed refunds for those customers disadvantaged by the error. Cooperating with UCAN, Pacific also worked to identify all other residential customers who were sent inaccurate calling profile information, whether or not those customers actually purchased a toll call plan. On balance, we think the Settlement adequately redresses the harm resulting from Pacific’s past error and proactively, will reduce the likelihood of future marketing errors.

In conclusion, the Settlement (including Attachments A and B to the Settlement), together with the record in this proceeding, provide sufficient information to permit us to make an informed evaluation that adoption of the Settlement is in the public interest. The remedies proposed in the Settlement have been carefully designed to prevent a repetition of the acts complained of and to achieve compliance with law.

## **7. Comments on Draft Decision**

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code, the otherwise applicable 30-day period for public review and comment is being waived.

## **Findings of Fact**

1. UCAN and Pacific, the two parties to this proceeding, have settled all issues and memorialized their agreement in the Settlement which is attached to their motion filed on June 22, 2000.
2. The settlement is unopposed.
3. The settlement is an all-party settlement.
4. Before they entered into settlement negotiations, the parties completed extensive discovery, reached a comprehensive list of stipulated facts, and drafted and distributed prepared testimony.
5. Informing identified customers about the prior, erroneous assessments of toll calling plan value will empower these customers to make informed choices about whether or not to purchase a toll calling plan in future, and if they have purchased one already, to decide whether it does meet their needs.
6. A telemarketing feedback loop, like the one detailed in Attachment A of the Settlement, is critical to enable timely referral and resolution of any consumer

complaints which arise in connection with marketing activities like the one at issue in this complaint.

7. In the future, Pacific should identify which monthly telephone bill is used as the basis for any customer savings calculations. Pacific should not use “averages,” since, for example an “average” of several months’ usage data may not reflect accurately whether an optional, monthly service plan has savings potential.

8. The Settlement adequately redresses the harm resulting from Pacific’s past error and proactively, will reduce the likelihood of future marketing errors.

9. The settlement is reasonable and in the public interest.

### **Conclusions of Law**

1. The Settlement meets the all-party settlement guidelines outlined in D.92-12-019.

2. The Settlement comports with the requirements of Rule 51.1(e), as well as the public interest criteria articulated in D.88-12-083 and followed in subsequent Commission decisions.

3. Under the facts of this case, a penalty is not warranted.

4. The Settlement should be adopted.

5. The terms of the Settlement comply with Rule 51, which provides that adoption of a settlement does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

6. In order to provide certainty to the parties and to ensure, for the benefit of customers, that the provisions of the Settlement are implemented as promptly as practicable, this order should be effective immediately.

**O R D E R**

**IT IS ORDERED** that:

1. The Settlement Proposal between Utility Consumers' Action Network and Pacific Bell is approved.
2. Case 99-06-053 is closed.

This order is effective today.

Dated October 25, 2001, at San Francisco, California.

LORETTA M. LYNCH  
President  
HENRY M. DUQUE  
RICHARD A. BILAS  
CARL W. WOOD  
GEOFFREY F. BROWN  
Commissioners

# **SETTLEMENT AGREEMENT**

**(NOT AVAILABLE IN ELECTRONIC FORM.**

**SEE CPUC FORMAL FILES FOR A COPY OF THE SETTLEMENT AGREEMENT.)**